IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.3215 OF 2006

Raeesa Mohammad Yusuf ...Petitioner

Versus

Isanbhai Mohammad Hasan Haji
(Deceased) & Ors. ...Respondents

Shri S.U.Dhakephalkar for the Petitioner.
Shri A.R.Shaikh for the Respondent Nos.5A to 5L.

CORAM : ABHAY S.OKA, J.
DATED : JUNE 28, 2007.

P.C.:

1. Heard the Advocate appearing for the Petitioner and the learned Advocate appearing for the Respondent Nos.5(A) to 5(L). The Respondent No.1 is dead even before filing of the Petition. The office noting shows that the fourth Respondent is represented by an Advocate. The second and eight Respondents have refused to accept the service of notice and rest of the Respondents are served.

2. The Petitioner is the Plaintiff in a suit for declaration that he has a 1/13 share in the suit property. Prayer is also made for partition and for mesne profits.

3. An Application for amendment was made at Exhibit

81 by the Petitioner. The defence of the contesting Defendants was that there is a Deed of family arrangement executed on 22nd September, 1983 by the original Defendant Nos.1 to 5. By the proposed amendment, the Petitioner wants to incorporate an additional prayer for declaration that the said family arrangement dated 22nd September, 1983 is not binding. For claiming the said relief, he wants to add a paragraph containing necessary averments.

4. By the impugned order dated 01st March, 1999 the learned trial Judge rejected the said Application by holding that the Petitioner was trying to make out an altogether new case which was not made out earlier and therefore, it will cause prejudice to the Defendants. The learned Judge observed that amendment was sought to be carried out belatedly.

5. The learned Advocate for the Petitioner submitted that proposed amendment will not change the nature of the suit. The learned Advocate for the Respondent Nos.5(A) to 5(L) submitted that the Application for amendment was moved after the Petitioner led evidence and at such a belated stage the amendment could not have been allowed. He submitted that proposed amendment is barred by limitation.

6. I have considered the submissions. The substantive prayer made in the suit filed by the Petitioner is for declaration of 1/13th undivided share and for partition. By way of defence, some of the Defendants have pleaded the existence of a document of family arrangement dated 22nd September, 1983. The Petitioner wants to add a consequential prayer seeking a declaration that the said document is not binding on the Petitioner. Therefore, the learned trial Judge has committed an error by observing that the Petitioner was trying to make out a new case. So far as aspect of delay is concerned, the suit has been filed prior to coming into force of the amendment to the Code of Civil Procedure, 1908 which amendment was brought on the statute book with effect from 01st July, 2002. To avoid multiplicity of proceedings, the amendment ought to have been granted. The prejudice which may be caused to the contesting Respondents can be compensated by awarding costs. If certain witnesses are already examined, the parties can be permitted to recall the said witnesses and to lead further evidence.

7. Hence, I pass the following order:

(i) The impugned Judgment and Order dated 01st

March, 1999 is quashed and set aside and Application made by the petitioner at Exhibit 81 in Special Civil Suit NO.26 of 1995 is allowed subject to the Petitioner paying costs of Rs.2,500/- to the Respondent Nos.5(A) to 5(L) within a period of eight weeks from today.

(ii) It will be open for the Defendants to file additional written statement. It will be also open for the parties to recall the witnesses who are already examined and to lead further evidence in the light of the amendment.

(iii) All contentions of the parties on the merits of the suit are kept open.

(iv) It is made clear that all the contentions of the Defendants including the contention based on bar of limitation are expressly kept open.

(v) Writ Petition is partly allowed in above terms.

JUDGE